FEDERATION REPORTS.

ALI AHMAD v. CHOP BEE HIN.

[Orig. Civ. Juris. (Callow, J.) February 5, 1950]

[Alor Star — Civil Suit No. 85 of 1949]

Agency — Bailment — Mandatum — Liability of bailee who undertakes to perform services for another.

In this case the plaintiff purchased cloth from the defendant and also asked him to arrange for the cloth to be pattern printed. The defendant received money for the cloth, cost of printing and cost of transport of the cloth to the plaintiff. Instead of getting them pattern printed as required by the plaintiff, the defendant sought to profit by requiring the printer to lower his costs with the result that the printed sarongs were of inferior quality to that ordered by the plaintiff. The plaintiff claimed damages.

Held, that in this case the defendant was liable as, on the facts, he had not acted honourably and had been fraudulent in undertaking what he had undertaken to do.

Case referred to :—

(1) *Whitehead v. Greetham* 2 Bing. 464.

CIVIL SUIT.

Ismail Khan for the plaintiff.

Khoo Eng Cheang for the defendant.

The facts and arguments appear sufficiently from the Judgment.

Cur. Adv. Vult.

Callow, J. : — The claim is

"(a) for the recovery of the sum of $1,820/- and costs;

(b) for an order that the defendants do retrieve the 24 Kudis of unsatisfactory goods; and/or

(c) any other or further order as this Hon'ble Court may think fit."

The parties' versions of the transaction are diametrically opposed, so my first duty is to decide which to believe. The plaintiff called one witness besides himself, and the defendant two. I paid close attention to the evidence and demeanour of all and I accept the version of the plaintiff. The plaintiff's witness Phua Chin Teik appeared to me the most independent witness I heard and his evidence supported that of the plaintiff. The defendant's witnesses were both his employees, and Lim Sek Kee (3 D.W.) I did not favour.

I visited the premises of the defendant in the company of Counsel and so acquainted myself with the features of the shop.

The facts I find are that the plaintiff journeyed from Kota Bahru to buy Kedah sarongs in Alor Star. He had first to purchase the cloth and then get it pattern printed, in consequence he entered the plaintiff's shop and his requirements were discussed. This was on the 22nd of May, 1949.

As a result the defendant recommended him to Phua Chin Teik (2nd witness) and the plaintiff after contacting the printer-cum-dyer (the patterns are coloured) returned with him to the plaintiff.

There is evidence by Lim Kheah Swee (2 D.W.) that this order proffered by the plaintiff was unusually large and it seems a fair inference that it would ensure the personal attention of the defendant proprietor, indeed the whole order could not be supplied from stock, 180 pieces (or Kayu) were sought but the defendant had only 100 on hand at the moment, but being enterprising he offered to procure the balance of the 80 pieces from Penang and this he did for sale the next day.

The business was transacted at a small table in the shop which I saw and is obviously used for such purposes. The plaintiff paid $1,200/- for the cloth, plus $1,050/- for printing and $30/- for rail freight from Alor Star to Kota Bahru. The salesman was Lim Sek Kee (3 D.W.) but throughout the defendant was present and taking his proper place as the shop proprietor.

To conclude the transaction on the 22nd May, 1949, the agreement Exhibit "A" was drawn up at the dictation of the defendant. The results of this first transaction proved satisfactory; the sarongs were duly printed, despatched and accepted by the plaintiff; they form no part of the claim in this action.

It is the transactions on the following day the 23rd of May, 1949, which are the subject of the claim. The plaintiff returned to the defendant's shop and the defendant produced the balance of the order, 80 pieces. He paid $960/- for the cloth, $840/- for the cost of printing and $20/- rail freight, totalling $1,820/- the amount shown in item (1) of the plaint.

I am satisfied that this business on the 23rd of May, 1949, was done by the plaintiff with the defendant. The salesman Lim Sek Kee was present but in a subordinate capacity. The same arrangements were made for printing by Phua Chin Teik; he was to deliver the printed sarongs to the defendant at his shop and there receive payment if the work was approved, the printed articles were then to be forwarded by the defendant to the plaintiff at Kota Bahru.

Now it is obvious that the second consignment consisting of sarongs printed from the 80 pieces are not comparable with the first consignment; neither the printing nor the dyes are as good. Therefore early in August, 1949, the plaintiff travelled from Kota Bahru to complain to the defendant. At first the defendant maintained that the second consignment was up to sample and said it had been printed as before by Phua Chin Teik.

Thus the plaintiff contacted Phua Chin Teik and it transpired that earlier the same morning the defendant had spoken with Phua Chin Teik and urged him to say that he had printed the whole of the second consignment. In fact, of the second consignment, Phua Chin Teik printed only 138 sarongs and these at a lower price on the defendant's request for a cheaper rate. The remainder of the second consignment was not printed by Phua Chin Teik. It is alleged that they were done by Lee Boon Geok, but this printer was not called. Clearly the sarongs of the second consignment are of inferior print and dye compared with those of the first lot; Phua Chin Teik attributes the poorer quality and the work done by him to the defendant's demand for a lower charge, and Lee Sek Kee stated that with respect to the work entrusted to Lee Boon Geok the contract price was $30/- per Kudi of 20 sarongs as against $35/- per Kudi already paid for by the plaintiff.

To return to the meeting of the plaintiff and Phua Chin Teik which occurred on the 12th of August, 1949, they went together to the defendant's shop, and evidently high words passed.

The following morning the parties met again and there was an effort to settle, but it was unsuccessful and this action resulted.

Now, having found those facts I have to consider whether or not the defendant is liable. There was no consideration in the usually accepted legal sense of the term; the defendant obliged the plaintiff by putting him in touch with Phua Chin Teik, and the arrangements were that the printer was to receive payments from the defendant as and when he delivered the sarongs satisfactorily prepared for despatch to the plaintiff at Kota Bahru. It was a facility which an enterprising business man would make to encourage and further custom.

Mr. Khoo Eng Cheang for the defendant with his usual thoroughness and diligence argued that his client was no party to any contract, and if any contract existed it was between the plaintiff and the salesman Lim Sek Kee. I do not find that in the ordinary usage of the word that there was a contract. It was more a bailment; the contract was the sale of the cloth. The defendant accepted as a favour to the plaintiff and in consequence of the purchase of the cloth the money for the printing and undertook to pay it to Phua Chin Teik as he satisfactorily concluded the printing of the sarongs. He (the defendant) then undertook to forward the finished articles to the plaintiff at Kota Bahru.

To what extent then, if any, is the defendant liable on account of the inferior articles which resulted from poorer work in consequence of lower rates demanded by the defendant?

Mr. Ismail Khan for the plaintiff cited *Halsbury's* Laws of England (Hailsham edition) Vol. 7, page 147, § 208.

> "A person who promises to perform services for another without valuable consideration incurs no liability for a refusal or failure to perform the services; but if he does perform them, he is bound to exercise reasonable care, the intrusting him with the performance being sufficient consideration for such an undertaking; and if he causes damage by his negligence, the fact that he is not remunerated for the services does not protect him from liability."

I find the defendant did in fact undertake to accommodate the plaintiff in this matter of printing the sarongs, and I think the law is better set out in *Chitty* on Contracts, 20th edition, page 849. This propounds the principles that the bailee (in this case the defendant) is not liable unless gross negligence, breach of order, or fraud is proved against him (1 *Hailsham* page 733, § 1207).

In this case the plaintiff trusted the defendant and the latter accepted this trust to ensure the proper printing of the sarongs on cloth purchased from his shop. He fulfilled his obligations as regards the first consignment, but in undertaking the accomplishment of the second consignment he did not act honourably; he sought to profit by requiring the printer to lower his costs. There is no evidence that he communicated this conduct to the plaintiff, indeed on the contrary he denied it.

It is the species of bailment described as mandatum (1 *Hailsham* page 737/8 § 1213), and the confidence of the plaintiff in the capacity, skill and honour of the defendant duly to perform the undertaking constitutes consideration moving to the defendant, *Whitehead v. Greetham*[1].

I do not find, therefore, that the mandatory (the defendant) acted honourably. He undertook to pass the printed sarongs and pay Phua Chin Teik on the work being done efficiently. He failed in this; he insisted on a lower rate than that agreed with the plaintiff, and did not entrust all the work to Phua Chin

Teik as arranged. He held himself out as able to pass and accept the prints of the second consignment to the standard of the first, and it is manifest that the latter were inferior.

Under these circumstances and on the facts I have found, I enter judgment for the plaintiff against the defendant on item (a) of the claim. As regards item (b) the unsatisfactory sarongs are in Court and I order them to be delivered to the defendant. The plaintiff is entitled to costs.

Judgment for the plaintiff

MOHAMED YATIN BIN ABU BAKAR v. PUBLIC PROSECUTOR.

[App. Crim. Juris. (Spenser-Wilkinson, J.) February 13, 1950]

[Kuala Lumpur — Criminal Appeal No. 33 of 1949]

Penal Code, ss. 511 and 420 — Attempted cheating — Burden of proof — Duty of the prosecution to produce all material evidence at the trial — Use of Police report — Criminal Procedure Code, s. 108A.

This was an appeal against a conviction under sections 511 and 420 of the Penal Code. It was alleged that the accused had submitted false hotel bills and he had claimed the expense from the Customs Department in which he was employed and had thereby attempted to cheat them. The learned Sessions Judge in his grounds of judgment said that he regarded the defence version which was that accused and his wife had in fact stayed at the hotel as unlikely and that he believed the evidence of the prosecution witnesses who said accused and his wife did not come to stay at the hotel. It appeared that a material witness— an English-speaking clerk at the hotel — was not called by the prosecution and that the Police report was put in as an exhibit without the person making the report being called.

Held, (1) that it is not the correct approach to a decision in a criminal case to approach the question of the guilt or innocence of the accused on the basis of deciding which of two stories the Court should believe, but the Court should consider whether the story of the accused has thrown a reasonable doubt on the truth of the prosecution case and, if so, the accused is entitled to an acquittal; (2) that the prosecution should in this case have called the English-speaking clerk at the hotel, as he was a material witness; and (3) that as the person who made the report was not called as a witness the report should not have been admitted in evidence.

Cases referred to :—

(1) *Ng Lam v. Public Prosecutor* (1939) F.M.S.L.R. 8; (1940) M.L.J. 74.

(2) *Rex v. Abramovitch* 24 Cox's Criminal Cases 591.

(3) *Loh Chak Wan v. Public Prosecutor* (1937) F.M.S.L.R. 68; (1939) M.L.J. 84.

(4) *Osman Khan v. Public Prosecutor* (1948) M.L.J. 56.

(5) *Chan Thim v. Public Prosecutor* (1949) M.L.J. 72.

(6) *Rex. v. Hamilton* 87 L.J. K.B. 734.

(7) *Woolmington v. Director of Public Prosecutions* (1935) A.C. 463.

(8) *Mancini v. Director of Public Prosecutions* (1942) A.C. 1.

(9) *Rex v. Garth* 33 Cr. App. R. 100.

APPEAL from Sessions Court.

R. P. S. Rajasooria for the appellant.

C. M. Sheridan for the respondent.

The facts and arguments sufficiently appear from the Judgment.

Cur. Adv. Vult.

Spenser-Wilkinson, J. : — The appellant was charged in the Sessions Court at Kuala Lumpur as follows :—

That you on or about 10.8.49 at Port Swettenham being a public servant to wit R.O.D.O. No. 418 did attempt to cheat the Customs Department by submitting a false voucher claiming an expense of $202.60 being $38.50 in excess of what was legitimately due to you regarding your transfer from Butterworth to Port Swettenham, an offence punishable under Sections 511 and 420, Penal Code.

The following statement of the facts is taken from the grounds of decision of the President of the Sessions Court :—

The case concerns four receipts, P2a, P2b, P2c and P2d, which are allegedly from the Simla Hotel, Penang. These receipts claimed that the accused expended the sum of $38.50 in respect of board and lodging in the Simla Hotel, over the period of the 30th and 31st July. The crux of the Prosecution case was that the accused and his family never went near the Simla Hotel. To prove this they relied on the evidence of P.W.3, the Hotelkeeper of the Simla Hotel, and P.W.4, one of his assistants. P.W.3 stated that he had never seen the accused before; that he was certain that the accused never stayed in his Hotel on the night of the 30th/31st July; that the receipts as produced by the accused were not in the form or the chop which are issued by his Hotel; that the signature on the receipts, K.M. Ismail Ghaus, meant nothing to him and thereby that none of his employees bear that name. He produced P3a, P3b and P3c, on each of which was a different chop. These three forms and these three chops are the forms and chops used by him when giving receipts.

The appellant being called upon for his defence gave evidence on his own behalf and also called his wife. The gist of their evidence was that they did stay two nights in this hotel; that the appellant did receive the receipts from P.W. 4 although he did not see him writing them out and that he had paid the money represented by the receipts.

The learned President accepted the evidence of the 3rd and 4th prosecution witnesses and rejected the evidence of the appellant and his wife and accordingly convicted the appellant and sentenced him to two